



Office of the Attorney General

State of Texas

March 24, 1993

DAN MORALES

ATTORNEY GENERAL

Ms. Karen W. Osborne
Assistant General Counsel
Texas Department of Criminal Justice -
Institutional Division
P.O. Box 99
Huntsville, Texas 77342-0099

OR93-121

Dear Ms. Osborne:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18505.

The Texas Department of Criminal Justice - Institutional Division (the "department" or "TDCJ-ID") received an open records request for a copy of a former department employee's personnel records, including records pertaining to the employee's termination from employment. The requestor has obtained and submitted to the department the former employee's authorization for the release of these records. You state that the department has released to the requestor much of the requested information; you seek to withhold, however, other documents that you contend come under the protection of sections 3(a)(1), 3(a)(7), 3(a)(8), and 3(a)(11)¹ of the Open Records Act.

We note at the outset that you do not identify any specific record as coming under the protection of section 3(a)(1). Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." After reviewing the documents at issue, we have determined that none of the information submitted to this office is deemed confidential by law.

You first contend that Document 1, an inter-office memorandum from an assistant general counsel to the department's Deputy Director of Operations, comes under the protection of section 3(a)(7), which protects, *inter alia*, an attorney's legal opinion and advice to a client. See Open Records Decision No. 574 (1990). After reviewing the

¹Although you raised section 3(a)(3) in your initial correspondence to this office, you did not explain how the requested information relates to pending or reasonably anticipated litigation to which the department is or may be a party. See Open Records Decision No. 551 (1990). You did not raise or brief this exception in subsequent correspondence. Accordingly, we deem the protection of this exception as waived. See Attorney General Opinion JM-672 (1987).

memorandum at issue, we conclude that it consists of the type of information section 3(a)(7) was intended to protect. Accordingly, the department may withhold Document 1 pursuant to section 3(a)(7).

You characterize Documents 2 and 3 as "TDCJ-ID internal dismissal documents which contain opinion, advice and evaluation statements from those individuals who reviewed the dismissal." Similarly, you state that portions of Documents 4 - 6, an incident report concerning the former employee's termination, consist in part of opinion, advice and evaluation statements. You contend that the marked portions of these documents come under the protection of section 3(a)(11). Section 3(a)(11) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency."

For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, writ ref'd), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this information. If, as a result of your review, you still desire to seek closure of Documents 2 - 6, you must re-submit your request and these documents, along with your arguments for withholding them pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

Finally, you contend that the department may withhold Documents 7 - 16 pursuant to section 3(a)(8). These documents consist of records of the Smith County Sheriff detailing events surrounding the incarceration of former employee for allegedly driving while intoxicated. Section 3(a)(8) protects

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). Generally, section 3(a)(8) serves to protect the following interests:

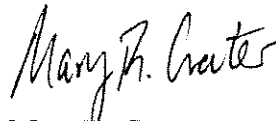
1) avoiding interference with the state's prosecution of a potential or pending criminal case; 2) preventing excess publicity which might deprive a defendant of a fair trial; 3) avoiding disclosure of the identity of informants; 4) preventing possible intimidation or harassment of witnesses; and 5) avoiding an unwarranted invasion of personal privacy.

Open Records Decision No. 252 (1980). Whether disclosure of particular records will unduly interfere with crime prevention must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981). Although the department is a law enforcement agency for purposes of section 3(a)(8), *cf.* Attorney General Opinion MW-381 (1981) (Texas Department of Corrections), you have not demonstrated how the release of these records to the requestor would interfere with the department's law enforcement efforts by compromising any of the interests listed above.

These records may also implicate the interests of other law enforcement agencies. However, it is not apparent from the face of the records that any law enforcement agency is conducting an ongoing investigation of the alleged DWI or that charges related to the alleged offense are pending. Further, this office has learned that, seven months after the arrest, the former employee has yet to be prosecuted for the alleged offense. Therefore, we assume any investigation into the charges is closed. You have not demonstrated that the release of these records would unduly interfere with the law enforcement of any other law enforcement agency. *See* Open Records Decision No. 252 (1980) (information contained in closed investigations not protected by section 3(a)(8) unless release would unduly interfere with law enforcement). Because you have not met your burden under section 3(a)(8), the department must release Documents 7 - 16 in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-121.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/RWP/le

Ref.: ID# 18505
ID# 18560
ID# 18907

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